IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO: 384 OF 2006 (M/S)

Smt. Wehrul Nisha W/o Late Sri Siraj Ul Haq, R/o Deer Wall Masjid Mohalla Asalatpura, Moradabad.

--------Petitioner.

Versus

1. Zia Ul Haq S/o Sri Anwar Ul Haq, R/o Shop No.1 Meat Market, Mallital, Tehsil and district Nainital.
2. Municipal Board, Nainital through its Executive Officer, district Nainital.
3. Civil Judge (J.D.), district Nainital.

--------Respondents

Sri Sharad Sharma, learned counsel for petitioners.
Standing Counsel for respondents.

Dated: April 17, 2006.

HON'BLE RAJESH TANDON, J.

By the present writ petition the petitioner has prayed for a writ of certiorari quashing the order dated 09.03.2006.

Briefly stated, a suit was filed by the respondent No. 1 Zia Ul Haq on 30.06.2003 praying prohibitory injunction against the petitioner who is defendant in the suit on the ground that the respondent No.2 Municipal Board had allotted a shop in a Meat Market Mallital, Nainital being shop No. 1 in favour of respondent No.1 and the petitioner jointly. The ground for attack in the suit was that the defendant has ignored that joint allotment and is interested to misappropriate the whole of the shop.

The counsel for the petitioner has submitted that in paragraph no. 7 of the plaint it has been mentioned that an illegal allotment has been made in favour of Roshan Aara. Similar statement has been made in paragraph 10 as well. During the pendency of the case issue No. 3 was framed with regard to the non-joinder of necessary party as to whether the suit is bad on account of non-joinder of necessary party. The issue was decided against the defendant on the ground that the cause of action accrued only against the person who has been arrayed as party. Since the issue has already been decided that the suit was not bad for non-joinder of parties, it is open for the petitioner to apply the impleadment of the applicant under Order I rule 10 CPC on the ground that she is affected party in accordance with the averments made in para 7 and 10 of the plaint as well as in the relief clause.

It is well established that non-joinder of the party and necessary or proper party are two separate issues.

So far as the is bad for non-joinder of party is concerned. the findings recorded by the

trial court is based on the relief claimed by the plaintiff, i.e. for injunction simpliciter.

However, Since Roshan Aara is affected person on account of the averments made in para 7 and 10 and relief clause, she is a proper party. In view of the above regarding proper party if the petitioner files an application under Order I rule 10 CPC the same may be considered after hearing both the parties. The application shall be disposed of independently without being affected by the impugned order in the writ petition.

Subject to aforesaid observations, the writ petition is disposed of. No order as to costs.

(Rajesh Tandon, J)

17.04.2006.
Negi.